No. 48540-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

WILLIAM PIPPIN,

Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, HOMELESS RIGHTS ADVOCACY PROJECT, OUTSIDERS INN, and REAL CHANGE

NANCY L. TALNER, WSBA #11196
talner@aclu-wa.org
DOUGLAS B. KLUNDER, WSBA #32987
klunder@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting interference in homes and private affairs without authority of law. It has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties.

The Homeless Rights Advocacy Project ("HRAP"), at the Korematsu Center for Law and Equality at Seattle University School of Law, strives to advance homeless rights advocacy. HRAP engages students in effective legal and policy research, analysis, and advocacy work to advance the rights of homeless adults, youth, and children. HRAP also builds partnerships across a broad range of disciplines with community members, advocates, academic institutions, and other stakeholders to advance the rights of homeless people; increases access to resources (education, information, communication) to support homeless rights advocacy; and advocates for the repeal of laws that criminalize homelessness and poverty and for the pursuit of alternatives that better

address the root problems of homelessness and poverty. This case concerns the criminalization of homelessness and implicates homeless rights issues that are at the core of HRAP's work. HRAP does not, in this brief or otherwise, represent the official views of Seattle University or its School of Law.

After years of experiencing homelessness and the violation of rights directly related to homelessness, Adam Kravitz of Vancouver Washington founded Outsiders Inn, a grassroots nonprofit organization that aims to heal the separation and discrimination of being unhoused residents through advocacy, awareness and support. Since being named a plaintiff in a Clark County case that ended in a federal ruling in 2016, Mr. Kravitz has been directly involved in developing policy and procedures in Clark County, WA concerning due process of handling homeless person's belonging and camps.

Real Change is an organization that exists to provide opportunity and a voice for low-income and homeless people while taking action for economic, social and racial justice. It publishes an award-winning weekly newspaper that provides immediate employment opportunity and takes action for economic, social, and racial justice. Many of its vendors are currently unsheltered or formerly unsheltered individuals. Real Change was founded in 1994 to offer immediate employment options for the poor

and homeless and challenge the structures that create poverty. Real Change serves its vendors through three integrated approaches: Vendor Program; Real Change Newspaper—Real Change is North America's leading street newspaper that provides work for about 800 homeless and low-income people annually; Real Change Advocacy—Real Change leverages relationships between vendors and readers to increase opportunities for homeless and low-income people.

ISSUE TO BE ADDRESSED BY *AMICI*

Whether Article 1, Section 7 permits the warrantless and suspicionless entry into and search of a person's makeshift shelter when that is the only home the person has.

STATEMENT OF THE CASE

This case is about the privacy rights of people who are unfortunate enough not to have stable, permanent housing. The facts and procedure of the case are adequately presented by the parties' briefing. A few facts bear repeating, as they are relevant to the argument below: [1]

For approximately two months in the fall of 2015, Vancouver did not enforce its ordinance prohibiting camping. During that period, a

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[1] This summary is based on the briefs of both parties.

community of people began living in makeshift dwellings in an area of downtown Vancouver; at least 80 sites were occupied. William Pippin was a member of that community, and lived in some sort of makeshift shelter, constructed in part by draping a tarp over a fence and guardrail. While the exact nature of Pippin's shelter is unclear, it is undisputed that one could not see inside his shelter from outside without lifting the tarp.

On November 2, 2015, officers went to the community to tell residents that they had to remove their structures that day, and that camping was not allowed between the hours of 6:30 a.m. and 9:30 p.m. When they reached Pippin's shelter, they rapped on the tarp. Pippin said he was just waking up and would come out in a moment. When he did not emerge quickly enough, an officer lifted the tarp, revealing Pippin sitting up in his makeshift bed; as Pippin got out of bed, officers saw a bag containing methamphetamine.

The trial court granted Pippin's motion to suppress the methamphetamine as the product of an unconstitutional warrantless search.

ARGUMENT

The parties dispute at great length whether Pippin had a reasonable expectation of privacy in his shelter, and whether his shelter fell within his

private affairs. *Amici* fully support Pippin's argument; when officers lifted the tarp, they opened a window into Pippin's intimate living arrangements and disturbed his private affairs. We write separately because the parties' debate on this point is entirely unnecessary. Rather than having to make a complex determination of the exact scope of "private affairs," this Court can easily resolve the case by recognizing that the officers invaded Pippin's home without authority of law.[2]

A. Article 1, Section 7 Explicitly and Categorically Protects the Privacy of Homes

Article 1, Section 7 of the Washington Constitution guarantees that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Much of the extensive jurisprudence surrounding this provision over the last few decades has centered on the first clause, the scope and protection of "private affairs." *See, e.g., State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) (holding that text message conversations are private affairs); *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007) (holding that information in a motel registry is a private affair). Our Supreme Court has described the scope of private affairs as being "those privacy interests which citizens of this state have held, and

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[2] *Amici* also fully support Pippin's argument that neither protective sweep nor exigency exceptions to the warrant requirement are applicable, and do not believe additional argument is necessary on that point. RAP 10.6(b)(4).

should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

That "private affairs" jurisprudence is so extensive that it has found its way into cases involving homes as well. The *Myrick* standard, intended only for delineation of the scope of private affairs, has nonetheless appeared in cases involving searches of homes. *See, e.g., State v. Budd,* 185 Wn.2d 566, 572, 374 P.3d 137 (2016) ("The expectation of privacy in the home is clearly one which a citizen of this state should be entitled to hold.") (quotations omitted). Many courts have simply treated homes and private affairs as interchangeable, albeit using the oft-repeated phrase that "[c]onstitutional protections of privacy are strongest in the home." *State v. Ruem*, 179 Wn.2d 195, 200, 313 P.3d 1156 (2013). In fact, some cases involving searches of homes have been decided directly as a violation of the "private affairs" clause of Article 1, Section 7. *See, e.g., City of Seattle v. McCready*, 123 Wn.2d 260, 271, 868 P.2d 134 (1994) (recognizing that "a non-consensual inspection of residential apartments is … a disturbance of 'private affairs' under Const. art. 1, § 7").

Despite this blurring of homes and private affairs in many cases, our Supreme Court has recognized that the second clause of Article 1, Section 7 ("or his home invaded"), properly stands on its own, and is a distinct source of privacy protection:

> In addition to "private affairs", Const. art. 1, § 7 explicitly protects the "home". In this case, a discussion of the protection of the home overlaps to some extent our analysis of the protection of private affairs because this case involves private activity within the home. However, we address the protection of the home separately because it is a distinct concept.

State v. Young, 123 Wn.2d 173, 184-85, 867 P.2d 593 (1994).

Young is particularly instructive because it analyzed the search at issue (use of thermal imaging) under both clauses of Article 1, Section 7. It first held that warrantless thermal imaging is an unconstitutional disturbance of private affairs, *see id.* at 181-84, and then followed with an independent analysis of the second clause of Article 1, Section 7 and held that warrantless thermal imaging is also an unconstitutional invasion of the home, *see id.* at 184-88.

Notably, *Young's* analysis of whether thermal imaging was a home invasion consisted almost entirely of analysis whether that imaging constituted an "invasion." *See id.* at 185-188. There was no discussion of whether there was an expectation of privacy within the home, unlike the discussion of expectations in the prior section determining whether thermal imaging constituted a disturbance of private affairs. Instead, the Court recognized that "in examining our state constitution's explicit protection of the home, the fact the search occurs at a home is central to the analysis." *Id.* at 185 n.2.

In the present case, this central part of the analysis resolves the case. There is no question that an invasion occurred when the officers lifted the tarp composing part of Pippin's shelter. Since this invasion of his home was made without authority of law, the results of the unconstitutional home invasion must be suppressed.

B. Pippin's Shelter Was His Home

Article 1, Section 7 protects against "home" invasion, but does not define the term. The case law is not very explanatory either. In one of the early decisions interpreting Article 1, Section 7, our Supreme Court applied it to students sharing a dormitory room, and held that warrantless entry into that room was unconstitutional. *See State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984). In so doing, the Court used the term "dwelling" interchangeably with "home." *Id.* at 820 ("Underlying this decision is the notion that the closer officers come to intrusion into a dwelling, the greater the constitutional protection."); *id.* at 822 ("The heightened protection afforded state citizens against unlawful intrusion into private dwellings, places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement."). The Court did not question that the dormitory room—a small, shared living

space within a larger building—was the students' "home" or "dwelling." But the Court also did not delineate the contours of either term.

One can therefore look to ordinary meanings as found in dictionaries. "Home" is defined as "one's principal place of residence," Webster's Third New International Dictionary 1082 (2002), "dwelling" is defined as "a building or construction used for residence," *id.* at 706, and "residence" is defined as "a temporary or permanent dwelling place, abode, or habitation to which one intends to return," *id.* at 1931.

With these definitions, it is easy to see that the term "homeless" is not strictly accurate. It refers to those people without "a fixed, regular, and adequate nighttime residence." 24 C.F.R. § 91.5. But just because their residences are inadequate does not mean that these people have no residence at all. All people need to eat and sleep, whether they live in mansions or live outside with the most minimal of shelter. If a so-called "homeless" person is fortunate enough to find a location that minimally meets his or her needs for shelter and relative safety, that person is likely to regularly return to the same place to sleep. At least the person will do so unless forced to move on, or until a better location—or, in the best case, stable housing—is found. Until such an occurrence, such persons will erect what shelter they can, use what bedding they can find, and make the best of their living situations. It is all too clearly visible that our society

has a substantial number of "homeless" people living amongst us; those people *reside* in our communities, and make their homes here. Plainly put, people of all sorts, both those living in mansions and those living on the street, have homes of some sort, places where they put their heads to sleep, places where they live their lives.

It should be noted that for many people, so-called "homelessness" is not a transient condition. They may be without adequate housing for extended periods of time. When people are not displaced and forced to dismantle their makeshift shelters, there are numerous examples of people living continuously in encampments—some for longer than a typical American stays in one residence, even years on end. *See, e.g.*, Bob Young, *Inside The Jungle: It may be grim, but some want to stay*, The Seattle Times, June 17, 2016, at A1 (discussing multiple long-time residents of a homeless encampment, including one living there for fifteen years). These people may be "homeless," but it would beggar belief to deny that they *reside* in encampments or deny that their shelters are their *homes*.

This situation is unfortunately far too common in the state of Washington. On one night in January 2016, more than 20,000 homeless people were counted in Washington—fifth highest among states in the country. U.S. Dep't of Housing and Urban Development, *The 2016 Annual Homeless Assessment Report (AHAR) to Congress* 12 (2016).

Although most states reported decreases in homelessness in 2016, Washington increased by over 7%, adding more than 1000 people to the ranks of those without adequate housing. *Id.* at 13. Many of these people have suffered for years; more than 2000 "chronically homeless individuals" were counted in Washington—sixth highest among states in the country. *Id.* at 64.

Vancouver is not immune to the problem of people lacking adequate housing for extended periods of time. In fact, the number of such people increased significantly in Clark County in 2015, around the time of Pippin's arrest. *See* Scott Hewitt, *Homeless census improves slightly*, The Columbian, June 4, 2015, at C1 (finding over 100 "chronically homeless" people, an increase of roughly 25% from the previous year). It is therefore not surprising that a community of such people began "*living* in temporary structures" in downtown Vancouver during a period when they were not forced to move every day. CP 35 (FF 6) (emphasis added).

Pippin lived in that encampment in his makeshift shelter. The record does not reveal exactly how long he lived there, but there is no dispute that his shelter was present for at least four days; officers saw it on October 29 and it was still present when they returned on November 2. CP 36-37 (FF 20, 29). It seems likely that Pippin would not have removed his shelter until forced to do so. Pippin was sleeping within his shelter "in a

makeshift bed of a sleeping bag and tarp." Brief of Appellant at 7. The continuous presence of his shelter, and his undisputed use of it as a sleeping area, leaves little doubt that Pippin's makeshift tarp shelter was his home. The trial court described it as his "dwelling," CP 40 (CL 5); it was the dwelling place to which he returned. No doubt it was not the home Pippin wished to dwell in, nor was it a home fit for habitation in a civilized society. But Pippin had no other place to live; poor as it was, his tarp shelter was nonetheless his home.

This fact entirely undermines the State's reliance on Division One's divided decision in *State v. Cleator*, 71 Wn. App. 217, 857 P.2d 306 (1993). *Cleator* involved the search of a tent by means of raising an opaque tent flap and looking inside, superficially similar to the raising of the opaque tarp on Pippin's structure. But the tent in *Cleator* "was not Cleator's home or the home of any other party." *Id.* at 222 n.8. As such, *Cleator's* holding that there was no violation of the private affairs protected by Article 1, Section 7 is entirely irrelevant to a determination of whether the home invasion clause of Article 1, Section 7 was violated in the present case.[3] In fact, the explicit mention that the tent was not

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[3] As stated above, *amici* fully support Pippin's argument that the search here disturbed Pippin's private affairs, including the argument that *Cleator* is both distinguishable on the facts and was wrongly decided.

Cleator's home could imply that the outcome of the case might have been different if the tent had, in fact, been Cleator's home.

Since here it *was* Pippin's home that was invaded without authority of law, the evidence obtained thereby must be suppressed.

C. Article 1, Section 7 Recognizes That *All* Persons are Entitled to at Least a Modicum of Privacy

Privacy is an essential ingredient of human life, a basic human right applicable to all. *See Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at art. 12 (protecting against interference with "privacy, family, home, or correspondence"). Privacy is a core aspect of our lives, which must be fostered by our legal system. "A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1028 n.6 (9th Cir. 2012) (quoting *Silverman v. United States*, 365 U.S. 505, 511 n.4, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)) (noting a probable reasonable expectation of privacy in homeless people's property). *Lavan* recognized that "our sane, decent, civilized society has failed to afford more of an oasis, shelter, or castle for the homeless" than the most minimal of shelters called EDARs in that case. *Id.* In the present case, the record does not show that our society has afforded even that level

of shelter to Vancouver's homeless. The only oases our society has afforded to them are what minimal makeshift shelters they are able to create for themselves; our sane, decent, civilized society must at least respect their privacy within those shelters.

Those members of our society without stable housing live under great disadvantages, and are unable to take the same precautions to protect their privacy that others take for granted (e.g., leaving items behind locked doors). But that does not mean privacy is unimportant to them, or that they don't take what steps they can to protect it. Tents, tarps, and other makeshift shelters not only provide some measure of protection from the elements, but also provide some measure of protection from the intrusion of outsiders. Pippin's tarp shelter "represented, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy." *State v. Mooney*, 218 Conn. 85, 112, 588 A.2d 145, 161 (1991).

Most of us in the bar and bench lead relatively comfortable lives. Our struggles and challenges are far more likely to involve professional, family, relationship, or medical issues than they are to concern the basic necessities of life: securing enough to eat, or finding a place to stay warm, dry, and unmolested as we sleep. Our concept of "camping" probably

involves cheery campfires, ghost stories, and s'mores—not huddling, day after day, under a bridge or under a tarp draped over a guardrail. Our life experiences are such that it is difficult to identify with people who live in such abject poverty that the difference between rain and shine, between balmy weather and a freezing night, may literally be a matter of life and death. But our constitutional principles transcend these differences, and it is our duty to look at them with "a penetrating eye for the facts of poverty in our nation and an acute review of what the case law requires in the world as it is." *City of Lakewood v. Willis*, noted at 186 Wn. App. 1045, 2015 WL 1552179 at *7 (2015) (unpublished) (Bjorgen, A.C.J., concurring), *rev'd*, 186 Wn.2d 210, 375 P.3d 1056 (2016).

The core of privacy lies in our homes, the places where we live and shelter:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

State v. Ferrier, 136 Wn.2d 103, 112 n.6, 960 P.2d 927 (1998) (quoting ultimately a speech by William Pitt in 1763). This oft-quoted eloquent formulation of privacy was "a historical antecedent" of Article 1, Section 7, and should inform our understanding of it. *Id.*

Privacy is not a privilege available only to the well off and middle classes, but is instead a right shared by the "poorest" among us. Indeed, in today's parlance, a person living in a "ruined tenement" is likely to be considered "homeless"—without "a fixed, regular, and adequate nighttime residence." 24 C.F.R. § 91.5. But that person still has a right to privacy, and that right is guaranteed by Article 1, Section 7.

When the officers lifted Pippin's tarp, they acted as impermissibly as an officer of the Crown entering a ruined tenement. Without authority of law to thus intrude on Pippin's privacy, the search was unconstitutional and the evidence must be suppressed.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court to affirm the superior court and suppress evidence obtained through the unconstitutional search of Pippin's home.

Respectfully submitted this 22nd day of December 2016.

By s/ Douglas B. Klunder

Douglas B. Klunder, WSBA #32987
E-mail: klunder@aclu-wa.org
Nancy L. Talner, WSBA #11196
E-mail: talner@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Telephone: (206) 624-2184
Fax: (206) 624-2190

Attorneys for *Amici Curiae*
American Civil Liberties Union of Washington
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NANCY L. TALNER, WSBA #11196
talner@aclu-wa.org
DOUGLAS B. KLUNDER, WSBA #32987
klunder@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2016, I caused to be served the foregoing *Brief of Amici Curiae American Civil Liberties Union of Washington, Homeless Rights Advocacy Project, Outsiders Inn, and Real Change* to the parties below, in the manner noted:

Via Email:

Rachael R. Probstfeld
Clark County Prosecuting Attorney
1013 Franklin St.
PO Box 5000
Vancouver, WA 98666
Rachael.Probstfeld@clark.wa.gov
CntyPA.GeneralDelivery@clark.wa.gov
prosecutor@clark.wa.gov

Casey Grannis
Nielsen, Broman & Koch, PLLC
1908 E Madison
Seattle, WA 98122
Casey.Grannis@nwattorney.net

DATED this 22nd day of December 2016 at Seattle, Washington.

By s/ Douglas B. Klunder

Douglas B. Klunder, WSBA #32987
E-mail: klunder@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Telephone: (206) 624-2184
Fax: (206) 624-2190

ACLU OF WASHINGTON

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Rachael.Probstfeld@clark.wa.gov
CntyPA.GeneralDelivery@clark.wa.gov
prosecutor@clark.wa.gov
Casey.Grannis@nwattorney.net
ewixler@aclu-wa.org
talner@aclu-wa.org